Supreme Court, U.S.
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90-1475

No.

IN THE

SUPREME COURT OF THE UNITED STATES

1990 TERM

WILLIAM KUNTZ, III, et al.

Petitioner,

against

MANLEY, BURKE & FISCHER, et al.

Respondents.

MEMORANDUM OF RESPONDENT MANLEY, BURKE & FISCHER IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Timothy A. Fischer, Esq.
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(513) 721-5525

I. ARGUMENT

There is no federal statutory or constitutional issue of any kind presented by this petition. Manley, Burke & Fischer (a corporation having no parent or subsidiary or affiliated companies) was retained by both of the joint owners of real estate as counsel to defend an eminent domain proceeding brought by the City of Dayton, Ohio. One joint owner was One Westminister, Inc., a corporation then in bankruptcy in Delaware (the petitioner was the sole owner of that corporation and was its largest creditor); the other joint owner was the petitioner, an individual resident of New York; there was a written contract with the trustee, and the representation was approved in advance by the Bankruptcy Court.

After the litigation, Manley, Burke & Fischer, pursuant to its written agreement, requested payment of its bill, 50% from the corporation in bankruptcy and 50% from the individual petitioner. The issues presented to the Courts below concern only the application for 50% of the total fees submitted to the Bankruptcy Court.

Upon written application to the Bankruptcy Court, and after a hearing, at which the petitioner appeared, questioned one witness, but made no argument in opposition to the application, the court allowed approximately $47,000 to be paid by the trustee. Upon appeals taken by the petitioner herein, that ruling was affirmed by the District Court and was again affirmed by the Third Circuit.

A different application was made to the Court of Common Pleas for

payment of the other 50% of the fees due, which application is not involved in this case.

With respect to the First Question Presented, whether the Bankruptcy Court was correct in awarding compensation to counsel for the time spent in preparing the fee application, that Question cannot be raised here because the Petitioner failed to present the issue to the Third Circuit, which accordingly made no ruling on that issue:

> "We intimate no view as to the correctness of Judge Roth's conclusion that counsel is entitled to compensation for the time expended in preparing fee applications in bankruptcy cases, a question we have not decided, since it is not squarely before us on appeal." (Judgment Order, U.S. Court of Appeals, Appendix A, p. 2a, n.1, Appendix to Petition.)

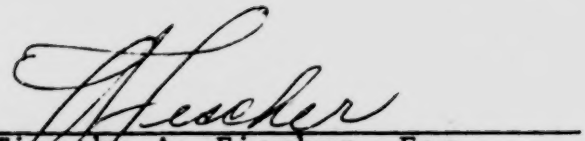
Even if the issue were raised and decided by the Third Circuit, this case would be particularly inappropriate for review since the underlying agreement to employ counsel provided that petitioner personally was to advance the fees to counsel and then he would seek reimbursement from the Bankruptcy Court, thus relieving counsel of the obligation to prepare a fee application.

Thus, petitioner himself assumed the obligation (and the risk of reduction) involved in the fee application process. It is disingenuous of him at this time to suggest that, under these circumstances, the costs of preparing the fee application should be disallowed. These facts were fully presented to the Bankruptcy Court and the District Court, which considered

them and made a ruling in accordance with well established authority. (See Appendix B, pp. 3-b-4-b, 12b, Opinion of District Court, and Appendix H, pp. 14-h-15-h, Appendix to Petition).

In petitioner's Second, Third and Fourth Questions presented, he is asking this court to review the weight of evidence which formed the basis for the amount of fees awarded. Not only is that an inappropriate task for this Court, those questions have been fully reviewed twice already, and the unanimous written decisions find no abuse of discretion or legal error. These issues raise no substantial federal statutory or constitutional questions.

Accordingly, respondent respectfully requests that the petition for writ of certiorari be denied.



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ACKNOWLEDGEMENT OF SERVICE

I hereby certify that the foregoing Memorandum of Respondent Manley, Burke & Fischer in Opposition to the Petition for Writ of Certiorari is being mailed to Petitioner, William Kuntz III, Box 1722, Broadway Station, Albany, New York 11201, on the 19 day of April, 1991. All parties required to be served have been served, as indicated above.

Timothy A. Fischer

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